IN THE

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1969

No. 1154

EARL LARSEN KESLER,

Petitioner,

vs.

CALIFORNIA

[redacted]

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Three and the Appellate Department of the Superior Court, County of Los Angeles, State of California.

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IN THE

Supreme Court of the United States

October Term, 1969
No. .....

EARL LARSEN KESLER,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, APPELLATE DEPARTMENT,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Three and the Appellate Department of the Superior Court, County of Los Angeles, State of California.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Earl Larsen Kesler, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Three, wherein on September 29, 1969 that court denied a hearing to review a judgment rendered against appellant by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, and to review said judgment of said Appellate Department of the Su-

perior Court, in which judgment the trial court's judgment was affirmed. The trial court found appellant guilty of driving while under the influence of intoxicating liquor, to wit, a violation of Section 23102 of the California Vehicle Code, and he was sentenced to pay a fine of $325.00 plus penalty or serve 30 days in jail.

The Appellate Department of the Superior Court certified upon their own motion a transfer of this cause to the Court of Appeal, stating:

> ". . . we certify that transfer of the above-entitled cause to the Court of Appeal appears necessary to settle an important question of law.
>
> The question so presented is:
>
> When a juror is excused during the course of a trial on a misdemeanor charge, must the defendant personally and expressly consent to the completion of the trial with less than twelve jurors?
>
> By our opinion, a copy of which is attached hereto, we held there was no such requirement and that stipulation of cournsel was sufficient. . . ."

Opinions Below.

The Municipal Court delivered no written opinion, the trial was by jury.

The Memorandum Opinion and Judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles was rendered September 22, 1969 by the Honorable Judges Whyte, Vasey, and Smith. A copy of said opinion is appended hereto and is marked Appendix A.

The Order Certifying Cause to Court of Appeal, is appended hereto and marked Appendix B.

The order of denial of transfer to the Court of Appeal, Second Appellate District, Division Three, was entered on September 29, 1969 and is appended hereto and marked Appendix C.

The Court of Appeal is the highest state court permitted to rule on this matter. The case cannot be taken to the California Supreme Court.

We have exhausted our remedies in the state courts of California.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is September 29, 1969.

2. A timely filed Memorandum Opinion and Judgment, and order certifying cause to court of appeal by the Appellate Department of the Superior Court for hearing by the said Court of Appeal, Second Appellate District, Division Three, was denied by them on September 29, 1969.

The judgment sought to be reviewed by the Appellate Department of the Superior Court was rendered September 22, 1969.

3. The statutory provisions believed to confer on the Supreme Court of the United States jurisdiction to review the judgments in question are:

The 6th Amendment of the United States Constitution, and,

The 14th Amendment of the United States Constitution.

4. An important and substantial question exists in which an issue of general importance is involved. That

is, the determination and settling of the question clearly whether a differentiation in the application of the law regarding rights of defendants in jury trials in criminal cases may be made by a state, between Felony cases and Misdemeanor cases, by merely designating them as such.

To wit: It is the uncontroverted law in California that in a felony criminal trial by jury, the defendant *must personally* express in open court his waiver of his right to a full jury of less than twelve people. No ruling of the California courts have been made regarding this right in misdemeanor cases—no matter how serious the misdemeanor case might be. This right is based upon the California Constitution, Article I, Section 7, which reads:

> "The right of trial by jury shall be secured to all, and remain inviolate: . . . A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, . . ."

In other words, is a defendant in a serious misdemeanor trial deprived of his constitutional rights of due process as guaranteed under the 14th Amendment of the United States Constitution when a state differentiates in its treatment of him merely because it is not a felony case.

Question Presented for Review.

1. Is there a denial of due process of law where a state court differentiates in its treatment of persons charged with a serious misdemeanor and persons charged with a felony, with regard to their rights under a jury trial, when both rights stem from the same constitutional state law?

Constitutional Provisions and Statutes Involved.

The Sixth Amendment of the United States Constitution, which guarantees trial by impartial jury and the right of an accused to be confronted by witnesses against him, and which has been made applicable to the states through the due process clause of the Fourteenth Amendment of the United States Constitution, and

The Fourteenth Amendment of the United States Constitution, which guarantees due process and equal protection call for procedures in criminal trials which allows no invidious discriminations between persons and groups of persons.

Patterson v. Medberry, 290 F. 2d 275 certiorari denied 825 S. Ct. 59, 368 U.S. 839, 7 L. Ed. 2d 39, rehearing denied 7 L. Ed. 2d 137;

U.S. Ex rel. De Lucia v. McMann, 373 F. 2d 759;

U.S.C.A. Const. Amendts. 6, 14.

Article I, Section 7 of the California Constitution, which reads:

> "Sec. 7. The right of trial by jury shall be secured to all, and remain inviolate: but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and in cases of misdemeanor, the jury may consist of twelve, or any number less than twelve upon which the parties may agree in open court."

California Vehicle Code § 23102, which reads:

"23102. (a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than 30 days nor more than 6 months or by a fine of not less than $250.00 nor more than $500.00 or by both such fine and imprisonment and upon a second or any subsequent conviction, within seven years of a prior conviction, by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than $250.00 nor more than $1,000.00. A conviction . . .

"(b) If a person is convicted of a second or subsequent offense under this section within seven years of a prior conviction and is granted probation, it must be a condition of probation that such person be confined in jail for at least five days but not more than one year and pay a fine of at least $250.00 but not more than $1,000.00.

(c) . . ."

California Vehicle Code § 13352:

"The department [of Motor Vehicles] shall immediately suspend or revoke the privilege of any person to operate a motor vehicle upon receipt of a duly certified abstract of the record of any court showing that the person has been convicted of driving a motor vehicle while under the influence of intoxicating liquor. The suspension or revocation shall be as follows:

(a) Upon a first such conviction . . . such privilege shall be suspended for a period of six months. . . .

(c) Upon a second such conviction within seven years, such privilege shall be suspended for one year and shall not be reinstated unless and until . . ."

(e) Upon a third or subsequent such conviction within 10 years such privilege shall be revoked and not be reinstated for a period of three years and until . . ."

Statement of the Case.

The appellant was charged with driving while under the influence of intoxicating liquor, a violation of the California Vehicle Code § 23102.

The case was tried in the Municipal Court before a jury. On the third day of trial one of the jurors was excused from further attendance because of illness. The trial was completed with eleven jurors out of the original twelve. This was done at the request of the court and by stipulation of both counsel. [Rep. Tr. 238]. However, the defendant (appellant here) did not personally join in the stipulation, nor did the court inquire of defendant whether he consented to being tried by less than a full jury of twelve.

The defendant was subsequently found guilty by the remaining eleven jurors.

The defendant had within seven years been guilty of the same offence—by a plea thereto, thereby making it a very serious matter for him, both by way of criminal penalties and also by virtue of the fact that he would lose his driver's license. He is a C.P.A. em-

ployed in an important position in a firm of accountants and is required to travel very extensively within approximately a 75 mile radius of Los Angeles to do auditing and other functions connected with his profession. It is not practical for him to attempt to travel by public transportation, consequently this penalty goes beyond being a "minor punishment" for him.

Upon appeal from the judgment in the trial court the Appellate Department of the Superior Court rendered a Memorandum Opinion and Judgment, sustaining the verdict, but they were impressed with the novelty and importance of the question of law enough so that they certified the cuuse to the Court of Appeal (Appendix A and B). This is the highest court in the State to which this matter can go.

The Court of Appeal denied hearing thereon.

Reasons for Granting the Writ and Argument Amplifying Same.

This honorable court has held in *Duncan v. State of Louisiana,* 88 S. Ct. 1444, 391 U.S. 145, 194, 20 L. Ed. 2d 491, rehearing denied 88 S. Ct. 2270, 20 L. Ed. 2d 1412, that although under Louisiana law a jury trial was not available in misdemeanor cases, that there where the punishment for simple battery was punishable by a fine of not more than $300, or imprisonment for not more than 2 years, that this constituted a serious crime and not a petty offense, and consequently the defendant there was entitled to a jury trial, pursuant to a provision in the Louisiana Constitution granting such rights only in cases in which hard labor or capital punishment was decreed.

The majority of this honorable court in an opinion expressed by Justice White held that: (1) Trial by jury in criminal cases being fundamental to the American scheme of justice, the 14th Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the 6th Amendment's guarantee of a jury trial, and (2) a crime punishable by 2 years in prison is a serious crime, and not a petty offense, which does not require a trial by jury.

In our instant case we have an analogous situation. The question is to determine what constitutes a serious enough crime to invoke the provisions of the California Constitution in the protection of one's jury rights as they are applied by our courts to Felony cases. A Felony case is defined as a crime punishable by death or in the state prison for 1 year or more (Cal. Penal Code §17), while every other crime is a misdemeanor.

Here, too, we have additional penalties applied, to wit, the loss of one's drivers license, which may be extremely serious in modern day living—to the point where it can impair one's livelihood. This is particularly true in the western part of the United States where public transportation is not as readily available as in the eastern cities.

The California courts have uniformly held in felony cases that the defendant must personally express in open court his waiver of his right to a full jury of less than 12 people. As an example:

In *People v. Maes*, 1965, 45 Cal. Rptr. 903, 236 Cal. App. 2d 147;

West's Ann. Const. Art. I, Sec. 7.

There the defendants (husband and wife) were charged and found guilty of conspiracy to commit petty theft (of a couple of dresses from a department store), a felony. During the course of that trial one of the jurors was excused (because of intoxication). Both counsel stipulated that "the matter may proceed before the eleven remaining jurors" although defense counsel purported to act for his clients, neither defendant personally expressed consent. The court held: waiver of a juror in a jury trial in a criminal case must be "expressed in open court by the defendant and his counsel." (Cal. Const. Art. I, Sec. 7), this constitutional requirement is rigidly applied.

There have been no decisions regarding a defendant's rights in misdemeanor cases to guide us, however, the California courts has been very clear (in felony cases) in holding that the defendant must personally join in the waiver: *i.e.:*

People v. Terry, 152 Cal. App. 2d 75 (312 P. 2d 709).

Holds that Consent by counsel alone is not enough.

In *People v. Pechor,* 130 Cal. App. 2d 616 (279 P. 2d 570) the court holding was that Expression of defendant's consent must be by language and not merely by conduct.

We feel that since the Constitution of California does not spell out specific limitations regarding a defendant's jury rights in misdemeanor cases, that the broadest interpretation should be made.

That the main principle of law as expounded by this honorable court in the *Duncan* case should apply, and that we should seek a more just interpretation based

upon the "severity of penalty" to guide us, rather than narrowing the rights of the individual by looking for technical definitions between "felony vs. misdemeanor" cases.

If this honorable court will forgive a short personal emotional—expression I would beg them to remember this.

The rights of the citizenry to jury trial and all it entails are too sacred an institution of our American principles of justice to allow it to be eroded by narrowing interpretations of the law. We must not allow ourselves the luxury of the speedy way of dispensing justice in the so called minor cases where it does not entail a "too severe" of a penalty (even though our courts are heavily crowded). Too much of the lives of mankind has been sacrified for the rights we now have —among these are those of a "jury trial of our Peers."

Conclusion.

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

HYMAN GOLD,
Attorney for Petitioner.

APPENDIX A.

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Earl Larsen Kesler, Defendant and Appellant. Superior Court No. CR. A. 8540, Trial Court No. 637898.

Appeal by defendant from judgment of the Municipal Court of the Los Angeles Judicial District, Francis A. Cochran, Judge.

Judgment affirmed.

For Appellant—Hyman Gold.

For Respondent—Roger Arnebergh, City Attorney, Samuel C. Pelter, Deputy City Attorney.

On the third day of a jury trial, one of the twelve jurors became ill and was excused by the trial judge with the stipulation of counsel for people and for defendant to proceed with eleven jurors. The defendant was not requested to and did not personally join in the stipulation. The trial proceeded with the defendant present in court and without any objection by him or on his behalf. The sole question presented on this appeal is were defendant's rights, either constitutional or statutory, violated by this procedure? We hold they were not.

The rule that defendant must personally and verbally waived a jury trial applies in misdemeanor cases. (*In re Adams* [1958] 160 Cal. App. 2d 454.) Appellant relies upon *People vs. Maes* [1965] 236 Cal. App. 2d 147 for the proposition that consent to be tried by a jury of

less than twelve is valid only upon a waiver as formal as that required for trial without any jury.

It is to be noted that *Maes,* in stating the rule, introduces the statement with the words "in a felony case". Reading the last sentence of Article I §7 of the Constitution indicates the reason for such limitation. That sentence reads: "In civil actions and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court". It is to be noted that this provision does not include, as does the provision for waiver of jury in a criminal case, that such agreement must be "expressed in open court by the defendant and his counsel".

We feel the difference in wording is significant. As to matters of procedure, defendants ordinarily act through counsel. Only because of the express wording of §7 above quoted has the exception that the waiver of jury must be by defendant expressly and personally developed.

It is additionally significant that the requirement for consent to a jury of less than twelve in a misdemeanor case is identical to that for a civil case. We doubt if it would be contended that the parties must expressly and personally agree to less than twelve jurors in a civil case. In civil cases, counsel alone may waive a jury.

We are not unmindful of the fact that the last sentence of Penal Code Section 1123 provides:

> "If, after all alternate jurors have been made regular jurors or if there be no alternate juror, a juror becomes sick or otherwise unable to perform his duty and has been discharged by the court as

provided herein, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may be again tried."

Notwithstanding the use of the word "shall" it is settled that this requirement for discharge may be waived (*People vs. Patterson* [1959] 169 Cal. App. 2d 179, 186; *People vs. Ragsdale* [1960] 177 Cal. App. 2d 676). Violations of strict compliance with the terms of Section 1123 must be objected to at the trial level. (*People vs. Kobey* [1951] 105 Cal. App. 2d 548, 559.)

The judgment is affirmed.

Dated September 22, 1969.

Whyte, *Presiding Judge*

We concur:

Vasey, *Judge*

Smith, *Judge*

APPENDIX B.

Order Certifying Cause to Court of Appeal.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Earl Larsen Kesler, Defendant and Appellant. Superior Court No. CR. A. 8540, Trial Court No. 637898.

Pursuant to Rule 63(a) and (c), California Rules of Court, upon our own motion, we certify that transfer of the above-entitled cause to the Court of Appeal appears necessary to settle an important question of law.

The question so presented is:

> When a juror is excused during the course of a trial on a misdemeanor charge, must the defendant personally and expressly consent to the completion of the trial with less than twelve jurors?

By our opinion, a copy of which is attached hereto, we held there was no such requirement and that stipulation of counsel was sufficient.

By the Court.

Dated September 22, 1969.

Whyte, *Presiding Judge*
Vasey, *Judge*
Smith, *Judge*

APPENDIX C.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

People of the State of California, Plaintiff and Respondent, v. Earl Larsen Kesler, Defendant and Appellant. 2d Crim. No. 17100, Superior Court No. CR A 8540, Trial Court No. 637898.

Filed September 29, 1969.

THE COURT:

The record on transfer in the above entitled cause having been filed in this Court on September 22, 1969, pursuant to certification made by the Appellate Department of the Superior Court of Los Angeles County, and this Court having considered the matter of whether such cause should be transferred to this Court for hearing and decision, now, therefore, it is hereby ordered that such transfer be and it hereby is denied.